Supreme Court, U. S.
FILED
JUL 31 1975
MICHAEL RODAK, JR., CLERK

No. 74-1376

IN THE

Supreme Court of the United States

October Term, 1975

CITIES SERVICE COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO MEMORANDUM FOR THE UNITED STATES

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of Counsel

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REPLY TO MEMORANDUM FOR THE UNITED STATES

In its Memorandum responding to the petition of Cities Service Company for a writ of certiorari to the United States Court of Appeals for the Second Circuit, the United States has contended for the very first time that petitioner's loss claim is barred by the statute of limitations for the year 1954, on the ground that the question of loss was first raised by petitioner in an amended claim for refund which respondent alleges was untimely because it was not filed within three years from the filing of the tax return or within two years from the time the tax was paid, as required by Section 6511(a) of the Internal Revenue Code of 1954. It is also alleged by respondent for the first time that no loss claim was ever made for the year 1953.

Petitioner, Cities Service Company, in reply to such erroneous allegations submits that:

(1) On March 24, 1964, petitioner filed timely claims for refund for 1953 and 1954 reciting the circumstances involving the exchange of its 3% debentures for its outstanding preferred and preference stocks and asserting that its debentures had been issued at a discount.

(2) On April 19, 1965, an agreement became effective between petitioner and the Commissioner of Internal Revenue, as provided for in sections 6501(c)(4) and 6511(c) of the Internal Revenue Code, extending the time for assessment or for claiming a refund of tax for the year 1954 until June 30, 1966. On April 14, 1966, another such agreement became effective extending such time to June 30, 1967. Copies of such agreements, which are entitled "Consent Fixing Period of Limitation Upon Assessment of Income and Profits Tax" (Form 872), are appended hereto.

(3) On February 11, 1966, petitioner filed an amended and supplemental claim to its original claim for 1954 asserting that it had suffered losses upon the retirement of the debentures which had been issued a discount. The claim for 1953 was not formally amended.

(4) The Commissioner of Internal Revenue took no action with regard to the claim for 1953, but on November 17, 1966, issued to petitioner a notice of disallowance, a copy of which is also appended hereto, specifically disallowing the claim for 1954 in the total amount referred to in the amended and supplemental claim of February, 1966.

(5) Because of the agreement which became effective on April 19, 1965, the amended and supplemental claim for refund for 1954 was indisputably timely.

(6) The original of the aforementioned agreement of April 19, 1965, is in respondent's possession, and the timeliness of the amended and supplemental claim for 1954 was known to respondent from the inception of this litigation and admitted by it in paragraphs 20 and 40 of the answer to the complaint filed in this case on May 31, 1968. See Complaint, paras. 20, 40; Answer, paras. 20, 40; R. A8, A13-14, A21, A24.*

(7) The Commissioner of Internal Revenue considered the merits of the claims for refund for 1953 and 1954 as a unit and refused to allow a loss deduction for both 1953 and 1954 as respondent also admitted at the commencement of this litigation. Complaint, para. 37; Answer, para. 37; R. A13, A23-24.

(8) In any event, the claims for refund for both 1953 and 1954 called to the attention of the Commissioner of Internal Revenue the exchange of the 3% debentures for the outstanding preferred and preference stocks in 1947 pursuant to the order of the Securities and Exchange Commission, raised the question of the proper "issue price" for such debentures, and resulted in extensive investigation and consideration by the Internal Revenue Service of all aspects of the transaction and its consequences.

(9) Although respondent in its Answer to the Complaint in this case questioned the *scope* of the claims for refund for 1953 and 1954, its contentions were rejected by District Judge Walter R. Mansfield in his opinion dated July 23, 1970 (R. A168-169) and were never renewed in any respect in subsequent proceedings in the District Court or in the Court of Appeals. Accordingly, the doctrines of *laches* or waiver should bar the assertion of such contention before this court almost five years later.

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* "R" refers to the Joint Appendix filed in the Court of Appeals.

(10) In its Memorandum, the respondent also opposes the petition for certiorari on the grounds that petitioner did not incur a deductible loss on the retirement of its 3% debentures because the Internal Revenue Code of 1954 does not recognize either gain or loss on the distribution of a dividend, upon the issuance of stock for property, or upon the retirement of shares of stock. Petitioner, however, has not claimed a loss on those grounds; its loss claim is based upon the retirement of its debentures at a cost in *excess* of *their* issue price. The Revenue laws and Treasury Regulations recognize and tax as income any gain upon the retirement of debt at a cost *less* than its issue price. They also recognize loss or expense in such transactions. The question as presented in the context of the instant case has never been directly ruled upon by the courts. It merits consideration by this Court.

Respectfully submitted,

THOMAS E. TYRE
Attorney for Petitioner
99 Park Avenue
New York, New York 10016

APPENDIX

FORM 872
(REV. 6-59)

To be executed
in duplicate

U.S. TREASURY DEPARTMENT—INTERNAL REVENUE SERVICE

CONSENT FIXING PERIOD OF LIMITATION UPON ASSESSMENT OF INCOME AND PROFITS TAX

IN REPLY REFER TO: Ap:NY:MDC

In pursuance of the provisions of existing Internal Revenue Laws, Cities Service Company, a taxpayer of 60 Wall
(Street address)
Street New York, New York 10005, and the Assistant
(City) (State)
Regional Commissioner-Appellate hereby consent and agree as follows:

That the amount of any income, excess-profits, or war-profits taxes due under any return made by or on behalf of the above-named taxpayer for the taxable year ended December 31, 1954, under existing acts, or under prior revenue acts, may be assessed at any time on or before June 30, 1966, except that if a notice of a deficiency in tax
(Date)
is sent to said taxpayer by certified mail or registered mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the making of an assessment is prohibited and for sixty days thereafter.

Cities Service Company

(Signature)[1] (Date)

[SEAL][2]

(Signature)[1] (Date)

By /s/ F.K. Foster Secretary April 15, 1965

(Signature) (Title) (Date)

/s/ Ellis L. Zacker

Assistant Regional Commissioner-Appellate

By /s/ Morris H. Moss April 19, 1965

(Title) (Date)

Special Assistant to the Chief, Appellate Division

RECEIVED
APR 10 1965
APPELLATE DIVISION
NORTH ATLANTIC REGION
(N.Y.C.)

[1] This consent may be executed by the taxpayer's attorney or agent, provided such action is specially authorized by a power of attorney, which, if not previously filed, must accompany the consent.

If executed with respect to a year for which a JOINT RETURN OF A HUSBAND AND WIFE was filed, this consent must be signed by both spouses unless one spouse, acting under a power of attorney, signs as agent for the other.

If a consent form is executed by a person acting in a fiduciary capacity, such as executor, administrator, or trustee, such person must submit Form 56, "Notice to the District Director of Internal Revenue of Fiduciary Relationship," together with certified copy of letters of administration, letters testamentary, trust instruments, or court certificate.

[2] If this consent is executed on behalf of a corporation, it shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which the seal of the corporation must be affixed. Where the corporation has no seal, the consent must be accompanied by a certified copy of the resolution passed by the board of directors, giving the officer authority to sign the consent.

FORM 872 (REV. JAN. 1965) — To be executed in Duplicate

U.S. TREASURY DEPARTMENT—INTERNAL REVENUE SERVICE

CONSENT FIXING PERIOD OF LIMITATION UPON ASSESSMENT OF INCOME AND PROFITS TAX

IN REPLY REFER TO: Ap:NY:JHC

Pursuant to existing Internal Revenue laws, Cities Service Company, a taxpayer (or taxpayers) of 60 Wall (Number, Street New York, New York 10005, and the District Director of Internal Revenue (or Assistant Regional Commissioner-Appellate) hereby consent and agree as follows:

That the amount of any Federal income or profits taxes due under any return (or returns) made by or on behalf of the above-named taxpayer (or taxpayers) for the taxable year ended December 31, 1954, under existing or prior revenue acts, may be assessed at any time on or before June 30, 1967, except that if a notice of a deficiency in tax is sent to the taxpayer (or taxpayers) by certified or registered mail on or before such date, then the time for making any assessment as aforesaid shall be extended beyond such date by the number of days during which the making of an assessment is prohibited and for sixty days thereafter.

RECEIVED
APR 13 1966
APPELLATE DIVISION
NORTH ATLANTIC REGION
(N.Y.C.)

CITIES SERVICE COMPANY

(Signature) (Title) (Date)

/s/ J.S. Nelson Vice-President Apr. 6, 1966

(Signature) (Title) (Date)

By /s/ Stephen C. Volpone

District Director of Internal Revenue or
Assistant Regional Commissioner-Appellate
(Signature) (Title) (Date)

/s/ John I. Boyle 4/14/66

(Signature) (Title) (Date)

By Assistant Chief, Appellate Branch Office

(Corporate Seal)

If the consent is executed for a year for which a JOINT RETURN OF A HUSBAND AND WIFE was filed, it must be signed by both husband and wife unless one, acting under a power of attorney, signs as agent for the other.

If the taxpayer is a corporation, the consent must be signed with the corporate name followed by the signature and title of the officer(s) duly authorized to sign. It is not necessary that the corporate seal be affixed. The space provided for the seal is for the convenience of corporations required by charter or by the laws of the jurisdiction in which they are incorporated to affix their corporate seals in the execution of instruments.

The consent may be executed by the taxpayer's attorney or agent provided such action is specifically authorized by a power of attorney which, if not previously filed, must accompany the forms.

If the consent is executed by a person acting in a fiduciary capacity (such as executor, administrator, trustee, etc.), Form 56, "Notice of Fiduciary Relationship," should, unless previously filed, accompany this form.

FORM L-60 (4-59)
(SEAL)

U. S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
DISTRICT DIRECTOR
120 CHURCH STREET
NEW YORK, N. Y. 10007
November 17, 1966

CERTIFIED MAIL

IN REPLY REFER TO
D:R:RO

Cities Service Co.
60 Wall Street
New York, N. Y.

IN RE: CLAIM FOR REFUND OF
$468,129.65
FOR THE PERIOD
1954

DLN MF 50010000 Form 1120

In accordance with the provisions of existing internal revenue laws, this notice of disallowance in full of your claim or claims is hereby given.

No suit or proceeding in any court for the recovery of any internal revenue tax, penalty, or other sum which is a part of the claim for which this notice of disallowance is issued, may be begun after the expiration of two years from the date of mailing of this letter.

Very truly yours,

/s/ EDWARD J. FITZGERALD, JR.
Edward J. Fitzgerald, Jr.
District Director

GPO 951-916